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Collateral Estoppel and the Seventh Amendment Right to a Jury Trial (Shore v. Parklane Hosiery Co.)

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FEDERAL JURISDICTION AND PRACTICE

COLLATERAL ESTOPPEL AND THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

Shore v. Parklane Hosiery Co.

The doctrine of collateral estoppel[1] bars the relitigation of issues by a party who has had a full and fair opportunity to litigate those issues in a prior action.[2] Since the doctrine tends to preserve judicial resources,[3] the trend in recent years has been to expand its

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[1] The doctrine of collateral estoppel must be distinguished from the related concept of res judicata. Under res judicata, a judgment on the merits will bar relitigation of the same cause of action between the same parties or those in privity with them. *See* Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955); Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); 1B MOORE'S FEDERAL PRACTICE ¶ 0.405[1], at 621-29 (2d ed. 1974) [hereinafter cited as MOORE'S]; RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 1, 1973) [hereinafter cited as RESTATEMENT]. In contrast, collateral estoppel applies when the subsequent lawsuit is based upon a different cause of action. In such a situation the judgment in the first action is conclusive as to issues actually litigated and necessary to the outcome of that suit. RESTATEMENT, *supra*, § 68, Comment b (Tent. Draft No. 1, 1973); *see* Tait v. Western Md. Ry., 289 U.S. 620, 623 (1933); Cromwell v. County of Sac., 94 U.S. 351, 356 (1876); 1B MOORE'S, *supra* ¶ 0.441[2], at 3777. *See generally* Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 IOWA L. REV. 217 (1954). For a comprehensive discussion of the doctrine of collateral estoppel, see Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942).

[2] *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 333 (1971); James Talcott, Inc. v. Allahabad Bank, 444 F.2d 451, 461-62 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971); Brightheart v. McKay, 420 F.2d 242, 245 (D.C. Cir. 1969). It would be a violation of due process to bind a party to a prior adjudication to which he had not been afforded a full and fair opportunity to litigate. *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971); Schwartz v. Public Adm'r., 24 N.Y.2d 65, 298 N.Y.S.2d 955, 246 N.E.2d 725 (1969). In determining whether collateral estoppel should be invoked, the courts examine numerous factors. *See* United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964). For example, in Zdanok v. Gliddon Co., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964), an employer who had lost a suit brought by one employee, sought to relitigate the same issues in a subsequent suit brought by other employees. Since the employer was fully aware of his exposure to these additional claims at the time of the first trial, the court held that it was fair to invoke collateral estoppel. *See* 327 F.2d at 953; *cf.* Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 538-41 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966) (court refused to apply collateral estoppel where first action not strenuously litigated). Mutuality of parties often is another important factor. *See* note 4 *infra*. Similarly, whether collateral estoppel is asserted in an offensive or defensive manner is an important consideration when applying the full and fair opportunity test. Collateral estoppel is used offensively when the plaintiff seeks to estop the defendant from contesting an issue he had previously litigated. Defensive collateral estoppel, on the other hand, is invoked by the defendant to prevent litigation of an issue which the plaintiff has already litigated against another defendant. *See* Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281, 289 (1957); Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967) [hereinafter cited as *The Impacts*].

[3] *See* 1B MOORE'S, *supra* note 1, ¶ 0.441[2], at 3779; *see, e.g.*, McConnell v. Nooner, 547 F.2d 54 (8th Cir. 1976); Burns v. East Baton Rouge Parish School Bd., 530 F.2d 1201 (5th

applicability.[4] An important issue which, until recently, had not been definitively resolved, was whether collateral estoppel effect could be given to determinations made in a fully contested equitable proceeding, where the effect would be to preclude a party from exercising his seventh amendment right to a jury trial[5] in a subse-

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Cir.), *cert. denied*, 429 U.S. 960 (1976); Reich v. City of Freeport, 527 F.2d 666 (7th Cir. 1976); Gerrard v. Larsen, 517 F.2d 1127 (8th Cir. 1975); Crane Co. v. American Standard, Inc., 490 F.2d 332 (2d Cir. 1973); Ritchie v. Landau, 475 F.2d 151 (2d Cir. 1973).

[4] For many years, the doctrine of mutuality of parties required that for a prior adjudication to be given estoppel effect, both parties must have been bound by it. *See* 1B MOORE'S, *supra* note 1, ¶ 0.411[1], at 1251; RESTATEMENT, *supra* note 1, § 93 (Tent. Draft No. 3, 1976); *see, e.g.*, Triplett v. Lowell, 297 U.S. 638, 642-46 (1936); Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918); Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912). Those in favor of the doctrine reasoned that, absent mutuality, a party against whom collateral estoppel is invoked could be deprived of his day in court, unfair results could occur where multiple claimants are involved and the joinder of all interested parties would be discouraged. *See* Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301, 308 (1961); Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968). *See also* Currie, *supra* note 2. Exceptions to the mutuality requirement were recognized in situations where its application would be unfair. For example, sureties were permitted to invoke collateral estoppel in an action brought by a creditor when there had been a prior adjudication in favor of the principal debtor. *See, e.g.*, United States v. Coast Wineries, 131 F.2d 643 (9th Cir. 1942); People v. Metropolitan Sur. Co., 171 App. Div. 15, 156 N.Y.S. 1027 (3rd Dep't 1916); Gill v. Morris, 58 Tenn. 614 (1872). Mutuality was also dispensed with in vicarious liability situations where the liability of the party seeking to invoke collateral estoppel was derived solely from the conduct of one exonerated for that conduct in a prior suit. *See, e.g.*, Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 128 (1912). These exceptions were developed by the courts in an effort to avoid the inconsistency of having the principal exonerated while the secondary party is found liable. *See* RESTATEMENT, *supra* note 1, §§ 96-99 (Tent. Draft No. 3, 1976); Moore & Currier, *supra*, at 311; Note, *The Impacts*, *supra* note 2, at 1016.

Today, mutuality of parties is no longer a requirement for invoking collateral estoppel. This development can be traced to the landmark case of Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942). In *Bernhard*, Judge Traynor advanced theories of collateral estoppel that are generally accepted today:

> The criteria for determining who may assert a plea of [collateral estoppel] differ fundamentally from the criteria against whom a plea of [collateral estoppel] may be asserted. The requirements of due process of law forbid the assertion of a plea of [collateral estoppel] against a party unless he was bound by the earlier litigation in which the matter was decided. . . . There is no compelling reason, however, for requiring that the party asserting the plea of [collateral estoppel] must have been a party, or in privity with a party, to the earlier litigation.

Id. at 809, 122 P.2d at 894.

Since that decision it has been held that due process considerations do not require mutuality of parties as a condition to the application of collateral estoppel. *See* United States v. United Air Lines, 216 F. Supp. 709, 725-26 (D. Nev. 1962), *aff'd sub nom.* United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964). In 1971, the Supreme Court settled the question holding that mutuality is not required. Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 350 (1971); *see* Cheramie v. Tucker, 493 F.2d 586, 589 n.10 (5th Cir.), *cert. denied*, 419 U.S. 868 (1974); Humphreys v. Tann, 487 F.2d 666, 671 (6th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974).

[5] The seventh amendment provides:

quent legal action brought by a different plaintiff.[6] In *Shore v. Parklane Hosiery Co.*,[7] the Second Circuit addressed this question and held that, despite the absence of mutuality of parties, collateral estoppel could be invoked to prevent a party from obtaining a jury trial on issues which were fully litigated in a prior nonjury proceeding.[8] Subsequently, the Supreme Court affirmed.[9]

Shore was a class action instituted on behalf of minority shareholders of Parklane Hosiery Co., charging twelve directors, officers and stockholders of Parklane with issuing a proxy statement containing materially false and misleading statements.[10] The proxy statement was sent to all stockholders to inform them that a meeting would be held to consider a proposed merger of Parklane with a privately-owned company controlled by the twelve individual defendants.[11] The stockholders contended that the proxy statement failed to disclose that the actual purpose of the merger was to satisfy the personal indebtedness of one of the defendants.[12] While this action was pending, the Securities and Exchange Commission (SEC) brought an injunctive suit against Parklane alleging the same facts.[13] The nonjury SEC trial went to judgment first, the

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> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII. The seventh amendment guarantees the right to trial by jury in actions at law, but not actions in equity or admiralty. *See* Curtis v. Loether, 415 U.S. 189, 195 (1974); Ross v. Bernhard, 396 U.S. 531, 533 (1970). *See generally 5* MOORE'S, *supra* note 1, ¶ 38.11[5], at 118.

[6] *Compare* Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971), *with* Crane Co. v. American Standard, Inc., 490 F.2d 332 (2d Cir. 1973). *See also* Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

[7] 565 F.2d 815 (2d Cir. 1977), *aff'd*, 47 U.S.L.W. 4079 (U.S. Jan. 9, 1979)

[8] 565 F.2d at 818.

[9] 47 U.S.L.W. 4079 (U.S. Jan. 9, 1979).

[10] 565 F.2d at 816. The plaintiff alleged violations of §§ 10(b), 13(a), 14(a) and 20(a) of the Securities Exchange Act of 1934, and the rules and regulations promulgated thereunder.

[11] *Id.* Following the meeting of the stockholders, Parklane merged with New PLHC Corp. *Id.* The minority stockholders were paid $2 per share subject to appraisal rights. *Id.* at 816-17.

[12] *Id.* at 817. In addition to arguing that a merger would not serve any valid corporate objective, the plaintiffs contended that the defendants did not reveal that termination of negotiations with respect to a lease held by Parklane would result in the loss of substantial financial benefits. *Id.* The complaint also charged that the appraisers employed by the defendants had insufficient information to make an accurate valuation of the shares. *Id.* Damages, costs, rescission of the merger and other appropriate relief as the court might grant were requested. *Id.*

[13] SEC v. Parklane Hosiery Co., 422 F. Supp. 477 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977). The action brought by the SEC alleged violations of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(1976), §§ 10(b), 13(a) and 14(a) of the Securities Exchange

district court holding that there were "material misstatements and omissions" in the proxy statement, constituting a violation of section 14(a) of the Securities Exchange Act of 1934.[14] On the basis of the decision in the SEC action, the plaintiffs moved for summary judgment in the class action, contending that collateral estoppel precluded the defendants from relitigating any material issues of fact regarding liability.[15] The motion was denied by the district court on the basis of the Fifth Circuit's decision in *Rachal v. Hill,*[16] which held that "the seventh amendment right to a jury trial of contested issues of fact [survives] any prior non-jury adjudication."[17]

A unanimous Second Circuit reversed.[18] Writing for the court,[19] Judge Mansfield initially noted the well-established principle that, notwithstanding the absence of mutuality of parties, the determination of an issue in a prior equitable proceeding is binding on a court of law.[20] Concluding that the technical requirements of collateral

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Act of 1934, 15 U.S.C. §§ 78j(b), 78m(a), 78n(a) (1976) and the various rules applicable to those sections. 422 F. Supp. at 477. The SEC sought a preliminary injunction and the appointment of a special counsel to make a new appraisal of the value of the stock. *Id.* The court granted a request by both parties that the hearing on the preliminary injunction be joined with the trial of the alleged violation. *See* SEC v. Parklane Hosiery Co., 422 F. Supp. at 479.

[14] 422 F. Supp. at 486. In determining whether the falsehoods and omissions were material Judge Duffy applied the test set forth in TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976). Since *Northway* requires a "showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder," *id.* at 449, Judge Duffy held that the deficiencies were material and, therefore, constituted violations. 422 F. Supp. at 486. At the conclusion of trial, Judge Duffy refused to order an injunction against future violations since there was no likelihood of reoccurrence and determined that appointment of special counsel would not be appropriate. *Id.* at 487. Parklane was ordered to correct the nondisclosures and misstatements. *Id.* Judge Duffy's findings were upheld by the Second Circuit. 558 F.2d 1083 (2d Cir. 1977).

[15] 565 F.2d at 818.

[16] 435 F.2d 59 (5th Cir. 1970), *cert. denied,* 403 U.S. 904 (1971).

[17] 435 F.2d at 64. *Rachal* involved a shareholder's derivative suit to recover damages incurred as a result of violations of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976), and § 5 of the Securities Act of 1933, 15 U.S.C. § 77e(1976). The complaint charged that the defendants had fraudulently manipulated the price of the capital stock of the corporation for their own benefit. 435 F.2d at 64. As in *Shore,* an adjudication of essentially the same issue had been reached in a prior SEC injunctive suit, and the plaintiff moved for summary judgment on the basis of that determination. *Id.* The *Rachal* court denied the motion for summary judgment on the ground that defendants would be deprived of their constitutional right to a jury trial in the private action if collateral estoppel effect were given to the earlier findings of the SEC suit. *Id.*

[18] 565 F.2d at 818. The district court certified its order pursuant to 28 U.S.C. § 1292(b) (1976). Because a controlling question of law was involved, the Second Circuit permitted interlocutory appeal in order to avoid an unnecessary trial. 565 F.2d at 818.

[19] The unanimous panel consisted of Circuit Judges Mansfield and Timbers and District Judge Dooling of the Eastern District of New York, sitting by designation.

[20] 565 F.2d at 818. Judge Mansfield noted that it is long settled that findings in equitable

estoppel had been met, the court next considered whether the seventh amendment requires that the defendants be given the opportunity "to relitigate the same issues of fact before a jury."[21] Pointing out that the right to a jury trial only applies where factual issues are in dispute,[22] the court rejected the proposition advanced by the Fifth Circuit in *Rachal* that the Supreme Court's decision in *Beacon*

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proceedings are entitled to preclusive effect in subsequent trials at law. *Id.* (citing Katchen v. Landy, 382 U.S. 323, 337-38 (1966); Brady v. Daly, 175 U.S. 148, 159 (1899); Smith v. Kernochen, 48 U.S. (7 How.) 198 (1849); Crane Co. v. American Standard, Inc., 490 F.2d 332, 343 (2d Cir. 1973)); *see* Paramount Transp. Sys. v. Local 150, Int'l Bhd. of Teamsters, 436 F.2d 1064, 1065 (9th Cir. 1971) (per curiam); Painters Dist. Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081, 1084 (5th Cir. 1969).

The *Restatement* adopts the general rule that "where in a proceeding in equity a question of fact is actually litigated and determined by final and valid decree, the determination is conclusive between the parties in a subsequent proceeding either at law or in equity on a different cause of action." RESTATEMENT OF JUDGMENTS § 68, Comment j, at 305 (1942). Prior to the merger of law and equity, a plaintiff could dictate whether the issues would be tried before a jury or not by exercising his choice of forum. Several alternatives existed whereby the plaintiff could sue in equity, obtain a nonjury trial, and still obtain legal relief. As a part of the "clean-up doctrine," a plaintiff could enter a prayer for damages incidental to his equitable cause of action. *See, e.g.*, Goldschmidt Thermit Co. v. Primos Chem. Co., 225 F. 769 (E.D. Pa. 1915), *cert. denied*, 263 U.S. 719 (1924). A second alternative available to a plaintiff was to commence his action in equity and, at the conclusion of the action, sue at law for damages thereby obtaining a jury trial solely for that issue. On the other hand, if a plaintiff desired a jury trial, he could bring his first action at law and bind the defendant to a jury determination of the issues. *See* Brady v. Daly, 175 U.S. 148 (1899); RESTATEMENT OF JUDGMENTS, § 68 (1942); McCoid, *Right to Jury Trial in the Federal Courts*, 45 IOWA L. REV. 726, 729 (1960); Note, *Civil Procedure—Right to Jury Trial—Collateral Estoppel*, 40 U. CIN. L. REV. 373, 375 (1971).

[21] 565 F.2d at 819.

[22] *Id.*; *see* Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944); Fidelity & Deposit Co. v. United States, 187 U.S. 315, 319-20 (1902); Diamond Door Co. v. Lane-Stanton Lumber Co., 505 F.2d 1199, 1203 (9th Cir. 1974). In support of its position that there was no jury trial right in the absence of a question of material fact, the court noted the summary judgment procedure available under Rule 56 of Federal Rules of Procedure. 565 F.2d at 819 (citing Diamond Door Co. v. Lane-Stanton Lumber Co., 505 F.2d 1199, 1203 (9th Cir. 1974); United States v. Stangland, 242 F.2d 843, 848 (7th Cir. 1957)). The Federal Rules also provide that a directed verdict may be granted if the evidence is insufficient to support a jury verdict in favor of the party against whom the judgment is rendered. 565 F.2d at 819 (citing Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935)); *see* FED. R. CIV. P. 50. In addition, a jury may be denied where it is not promptly demanded. 565 F.2d at 819; *see* FED. R. CIV. P. 38(d). In concluding that a denial of a jury trial under the facts in *Shore* would not violate the seventh amendment, the court stated:

> The party seeking the retrial has already exercised his right to be heard on the issues and to cross-examine witnesses with respect to them. The interests of finality, certainty and economy of judicial resources then come into play to preclude his relitigating the same issue a second or third time, with the possibility of inconsistent findings, absent some showing of fundamental unfairness in the prior proceeding or some unusual circumstances such as fraud that would render inappropriate the application of the doctrine of collateral estoppel.

565 F.2d at 819 (citing Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Cromwell v. County of Sac., 94 U.S. 351 (1876)).

Theatres v. Westover[23] mandates a jury trial where the element of mutuality is not present.[24] Judge Mansfield interpreted *Beacon Theatres* as merely requiring a court to arrange the trial of the legal

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[23] 359 U.S. 500 (1959). In *Beacon Theatres,* the plaintiff was a movie theatre operator who had acquired the exclusive right to show first-run films in a certain area. The defendant built a drive-in theatre in the area and threatened the plaintiff with a treble damage suit for antitrust violations for possessing the exclusive rights. *Id.* at 502. The plaintiff thereupon sought a declaratory judgment that no antitrust violation existed and an injunction prohibiting the defendant from bringing the antitrust suit. *Id.* at 502-03. In turn, the defendant counterclaimed for treble damages alleging antitrust violations and demanded a jury trial as to disputed factual issues. *Id.* at 503. Since the complaint stated a traditionally equitable cause of action for which no right to jury trial is recognized, and the counterclaim a cause of action cognizable at law for which there is such a right, the issue before the Court was whether defendant was entitled to a jury trial as to the common factual issues. *Id.* at 505. Noting the collateral estoppel effect which a determination of the factual issues in a prior trial of an equitable cause of action would carry, the Supreme Court held that the constitutional right to trial by jury required an adjudication before a jury of common issues of fact where a legal cause of action had been properly joined with an equitable claim for relief. *Id.* at 510; *see* 565 F.2d at 820. *See also* Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961).

[24] 565 F.2d at 820. *Shore* represents the culmination of the Second Circuit's disinclination toward the Fifth Circuit's position in *Rachal.* In Crane Co. v. American Standard, Inc., 490 F.2d 332 (2d Cir. 1973), the court had before it a purely equitable cause of action and held that damages could be awarded as part of the equitable relief without a jury determination. *Id.* at 342. In so ruling, the court stated that it was "not at all sure that *Rachal* was correctly decided." *Id.* at 343 n.15. More recently, in Goldman Sachs & Co. v. Edelstein, 494 F.2d 76 (2d Cir. 1974), the court delayed continuance of a nonjury trial pending completion of a jury trial on the same issue. The *Goldman* action was one of several similar claims pending against the same defendant which were to be litigated in separate trials. *Id.* at 77. One such action, in which all parties had waived their jury trial right, was designated the first to be tried. Fearing the collateral estoppel effect that a nonjury determination would have, Goldman petitioned for an order staying the nonjury trial until the completion of a jury trial on the issues. *Id.* Granting this motion, the Second Circuit reasoned that "[f]or the district court to proceed with the nonjury trial . . . threatens destruction of . . . [an] important collateral right to a jury trial." *Id.* at 78. In a strong dissent, Judge Oakes argued that the Second Circuit should have waited until the question of the effect to be given nonjury determinations in a subsequent action was properly before the court. *Id.* at 79 (Oakes, J., dissenting). In resolving this question, the *Shore* court concluded:

> In view of the limited scope of the Supreme Court's decision in *Beacon Theatres* and its inherent respect for the doctrine of collateral estoppel, we do not view the case, either in logic or in spirit, as requiring us to hold that after a litigant has had a full and fair non-jury trial of issues he may always invoke the Seventh Amendment to obtain a second trial of the same issues. To so hold would violate basic principles of fairness, finality, certainty, economy in utilization of judicial resources, avoidance of possibly inconsistent results, and achievement of the "just, speedy and inexpensive determination of every action."

565 F.2d at 821 (footnotes omitted). Judge Mansfield went on to say that the deprivation of a jury trial was not unfair because the defendants had made no effort to preserve their jury trial right. He suggested that defendants should have requested a jury trial or an advisory jury in the SEC action or sought to expedite trial of the private action so as to reach a judgment before the SEC decision was rendered. *Id.* at 822. More recent cases indicate that attempts to follow these suggestions have not been successful. *See* note 44 *infra.*

and equitable issues so as to protect the right to a jury trial. It was reasoned that the Supreme Court's concern over the sequence of trial stemmed from its assumption that collateral estoppel would preclude a jury trial on issues common to the equitable and legal claims if the equitable claims were tried first.[25] The *Shore* court also rejected the argument that, since the seventh amendment preserves the right to a jury trial as it existed at common law,[26] where mutuality of parties was a prerequisite to the application of collateral estoppel, the recent abandonment of mutuality should not work to preclude a jury trial.[27] Concluding that a rigid view of the trial by

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[25] In *Beacon Theatres,* the Supreme Court recognized that if the equitable claim were heard first, there would be no right to a jury trial with respect to common issues in the trial of a legal claim. The Court stated that

> the effect of the action of the District Court could be, as the Court of Appeals believed, "to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit," for determination of the issue of clearances by the judge might "operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim."

359 U.S. at 504. Following *Beacon Theatres,* it was assumed that an equitable determination could provide the basis for invoking collateral estoppel in a subsequent legal proceeding. *See* Katchen v. Landy, 382 U.S. 323, 336 (1966); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472 (1962). *Dairy Queen* involved a contract dispute between the plaintiff licensor and defendant licensee of a copyrighted trade name. In violation of the provision of the copyright contract, the defendant defaulted in his annual payments. *Id.* at 475. The plaintiff brought suit, requesting injunctive relief prohibiting further use of the copyright name and an accounting to determine the exact amount owed to him by the defendant. *Id.* The Supreme Court viewed the complaint as joining an equitable claim for an injunction with a legal claim for damages and, citing *Beacon Theatres,* held that the common factual issues had to be tried before a jury. *Id.* at 473. In *Katchen,* the petitioner objected to the right of a trustee in bankruptcy to recover a preference in a summary proceeding on the grounds that it would deny him his seventh amendment jury trial in a plenary proceeding. In rejecting the petitioner's argument the Court stated: "Both *Beacon Theatres* and *Dairy Queen* recognize that there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim." 382 U.S. at 339-40; *accord,* Goldman Sachs & Co. v. Edelstein, 494 F.2d 76, 78 (2d Cir. 1974); Crane Co. v. American Standard, Inc., 490 F.2d 332 (2d Cir. 1973); *In re* Transocean Tender Offer Sec. Litigation, 427 F. Supp. 1211, 1217 (N.D. Ill. 1977). The commentators have favored this interpretation of *Beacon Theatres. See* Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442, 446 (1971); Note, Goldman, Sachs & Co. v. Edelstein: *The Application of Collateral Estoppel Principles in Derogation of the Right to Jury Trial,* 1974 DUKE L.J. 970.

[26] 565 F.2d at 822; *see* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Scheidt, 293 U.S. 474, 476 (1935); Slocum v. New York Life Ins. Co., 228 U.S. 364, 377-78 (1913). *See generally* 5 MOORE'S, *supra* note 1, ¶ 38.08[5], at 79; Shapiro & Coquillette, *supra* note 25, at 449.

[27] 565 F.2d at 822. The defendants in *Shore* relied upon Dimick v. Scheidt, 293 U.S. 474 (1935), where it was held that it was a violation of the seventh amendment to compel a plaintiff to accept a judge's increased award for personal injuries. The Second Circuit in *Shore* found that the strict historical approach utilized in *Dimick* has been somewhat weakened by subsequent decisions of the Supreme Court. 565 F.2d at 822 (citing Ross v. Bernhard, 396

jury right as it existed in 1791 was unwarranted, Judge Mansfield determined that collateral estoppel barred relitigation of issues determined in the SEC suit.[28]

On appeal to the Supreme Court, Justice Stewart stated that, while offensive use of collateral estoppel raises a question of fairness not present when the doctrine is used defensively, under the facts presented, it did not operate to deprive the defendants of a full and fair opportunity to litigate.[29] Adding that there is no reason "why the meaning of the Seventh Amendment should depend on whether or not mutuality of parties is present,"[30] the Court affirmed the Second Circuit's decision.[31]

The *Shore* result is consistent with the spirit of *Beacon Theatres* and the historical underpinnings of the seventh amendment. In *Rachal,* the Fifth Circuit adopted the position that collateral estoppel could not extinguish the defendant's right to a jury trial since, in 1791,[32] the doctrine could not be invoked unless there was mutuality of parties.[33] It appears that the *Shore* analysis is a more accurate statement of the relationship of the doctrine of mutuality and the seventh amendment. Mutuality was intended to be a consideration in the application of collateral estoppel, not a characteristic of the right to trial by jury. Thus, the reliance of the *Rachal* court on the absence of mutuality to preserve the defen-

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U.S. 531 (1970); Bloom v. Illinois, 391 U.S. 194 (1968)). *Dimick* was also distinguished on the ground that it involved a personal injury action which had existed at common law while there was no common law counterpart to the SEC injunctive suit. 565 F.2d at 823.

[28] 565 F.2d at 823. This type of approach, which rejects an inflexible analysis of the common law jury right, allows for the development of procedural devices which have no common law counterparts. *See* Galloway v. United States, 319 U.S. 372 (1943). In *Galloway,* the Court held that directed verdicts did not violate the seventh amendment and stated that the seventh "[a]mendment was designed to preserve the . . . jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions." *Id.* at 392.

[29] Parklane Hosiery Co. v. Shore, 99 S.Ct. 645, 647 (1979).

[30] *Id.* at 654. In a dissenting opinion, Justice Rehnquist observed that the seventh amendment requires an inquiry into the common law practice of jury trial as it existed in 1791. He reasoned that, since the requirement of mutuality would preclude the use of collateral estoppel at that time, it could not be invoked in *Parklane* to deprive the petitioner of his right to a jury trial. *Id.* at 655 (Rehnquist, J., dissenting).

[31] *Id.* at 655. The Court pointed out other procedural developments, such as directed verdict, summary judgment, and retrial of damages, which diminish the scope of jury trial and yet have not been held to violate the seventh amendment. *Id.* at 654.

[32] The seventh amendment guarantees the right to a jury trial as it existed in 1791. *See* 5 MOORE'S, *supra* note 1, ¶ 38.07[1], at 44.1. Rule 38 of the Federal Rules of Civil Procedure does not affect this substantive right as it simply preserves "[t]he right of trial by jury as declared by the Seventh Amendment." FED. R. CIV. P. 38(a); *see* Rules Enabling Act, 28 U.S.C. § 2072 (1976).

[33] 435 F.2d at 64.

dant's jury trial right is misplaced. Since equitable determinations have always been binding on a court of law, the recent abandonment of the doctrine of mutuality should not work to bar application of collateral estoppel where the defendant has had a full and fair opportunity to litigate.[34]

The offensive use of collateral estoppel is a natural outgrowth of the abandonment of the mutuality requirement.[35] Nevertheless, its use leads to several negative consequences that do not result when the doctrine is employed defensively.[36] It has been pointed out, for example, that offensive collateral estoppel acts counter to the goals of judicial economy. Since a judgment favorable to one plaintiff can be relied upon by others, while an unfavorable determination is not binding, potential claimants are encouraged to adopt a "wait and see" attitude.[37] Defensive collateral estoppel, on the other hand, prevents a plaintiff from "switching adversaries" to relitigate issues that already have been adjudicated, and encourages joinder of all potential defendants in a single action.[38] A further argument offered in opposition to offensive collateral estoppel is that a defen-

[34] In endorsing the abandonment of the mutuality requirement in Blonder-Tongue Labs., Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971), the Supreme Court questioned "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issues." *Id.* at 328. In so stating, the Court articulated a basis for a more flexible approach to the use of collateral estoppel. Illustrative of this approach is Schwartz v. Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969), wherein the New York Court of Appeals indicated that "the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation" are all factors to be considered when questioning the applicability of collateral estoppel. *Id.* at 72, 246 N.E.2d at 729, 298 N.Y.S.2d at 961.

[35] The decision in *Shore* was foreshadowed by recent case law in the federal courts, *see, e.g.*, Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964); Maryland v. Capital Airlines, Inc., 267 F. Supp. 298 (D. Md. 1967); United States v. United Airlines, Inc., 216 F. Supp. 709 (E.D. Wash. & D. Nev. 1962), *aff'd.*, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964), as well as in the state courts, *see, e.g.*, Vanguard Recording Soc'y v. Fantasy Records, Inc., 24 Cal. App. 3d 410, 100 Cal. Rptr. 826 (1972); Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1969); Desmond v. Kramer, 96 N.J. Super. 96, 232 A.2d 470 (1967); B.R. De Witt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967); Bahler v. Fletcher, 257 Or. 1, 474 P.2d 329 (1970).

[36] Some courts have refused to apply collateral estoppel offensively. *See, e.g.*, McCook v. Standard Oil Co., 393 F. Supp. 256, 259 (C.D. Cal. 1975); Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (1958). Others, while expressing reservations, have permitted its application. *See* Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965); Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964). *See generally* Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968); Note, *The Impacts, supra* note 2.

[37] *See* Navarov v. Caldwell, 161 Cal. App. 2d 762, 767-68, 327 P.2d 111, 115 (1958); Reardon v. Allen, 88 N.J. Super. 560, 571-72, 213 A.2d 26, 32 (1965).

[38] *See* Bernhard v. Bank of America, 19 Cal. 2d 807, 812, 122 P.2d 892, 895 (1942).

dant confronted with a suit for nominal damages or nonmonetary relief may have less incentive to offer a vigorous defense or seek appeal from an adverse decision.[39] Since foreseeability is a key element in assessing the fairness of invoking collateral estoppel, some argue that it is unfair to preclude the defendant from contesting an issue de novo if the impact of a prior suit could not have been fully appreciated.[40] The potential for unfairness is particularly acute where the defendant is subject to a multitude of separate lawsuits. In Professor Currie's classic collision example,[41] it is noted that a judgment in favor of one plaintiff might be given preclusive effect in subsequent actions, although several prior suits against the defendant resulted in a finding of no liability.[42]

Permitting offensive estoppel under the facts of *Shore*, however, does not present any of these problems. The defendant was well aware of the pending private suit, had vigorously contested the SEC suit and had pursued an appeal to the Second Circuit where the decision of the district court was affirmed.[43] Nor can the plaintiffs in the private suit be said to have adopted a "wait and see" attitude since they could not have joined in the SEC action.[44]

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[39] *See* Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966). In *Berner*, the court refused to invoke collateral estoppel since the prior suit involved a judgment for $35,000 that was not appealed and the plaintiff in the second suit was asserting a claim for $7,000,000. 346 F.2d at 538-41.

[40] In the leading case of Evergreens v. Nunan, 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944), Judge Learned Hand indicated that foreseeability was a primary consideration in determining whether the use of collateral estoppel is unfair in a particular case. 141 F.2d at 929.

[41] Currie, *supra* note 2. Currie reevaluated offensive estoppel in a later article and concluded that his original criticism of its use may have been overbroad. *See* Currie, *Civil Procedure: the Tempest Brews*, 53 CAL. L. REV. 25, 27 (1965).

[42] Currie, *supra* note 2, at 285. Professor Currie referred to this situation as the "Multiple Claimant Anomaly." In his example, 50 passengers were injured in a train accident and brought suit against the railroad for personal injuries. Although the railroad prevailed in the first 25 suits, it was unable to use these determinations against subsequent plaintiffs because they had not been parties to the first suit. If the 26th passenger wins, offensive estoppel would allow all subsequent plaintiffs to invoke that judgment to establish the railroad's negligence. Such a result would not comport with notions of fairness. *Id.*

[43] SEC v. Parklane Hosiery Co., 558 F.2d 1083 (2d Cir. 1977).

[44] In *Shore*, the court stated that the defendants could have protected their jury trial right by requesting a stay of the proceedings until conclusion of the private suit or by requesting that the court try the SEC action before a jury or an advisory jury. 565 F.2d at 821-22. To the extent that defendants' requests would hinder the SEC in the exercise of its duties under the securities laws, several lower federal courts, under facts similar to *Shore*, have denied such requests and ordered that the Commission be allowed to proceed unobstructed regardless of collateral estoppel effects. *See, e.g.*, SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90 (2d Cir. 1978) (defendant not entitled to a jury trial in an SEC suit merely because collateral estoppel will be invoked against him in a subsequent private suit); SEC v. Hart, [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,454 (D.D.C. May 26, 1978)

The decision to allow offensive use of collateral estoppel should have a significant impact in a number of areas. For example, *Shore* can be expected to encourage settlements by defendants in SEC actions in order to avoid the collateral estoppel consequences of an unfavorable judgment.[45] This development will be most noticeable where an injunction is issued and its consequences are slight.[46] In addition, where a defendant has suffered an unfavorable judgment in a prior SEC suit, private suitors can be expected to rely on *Shore* and pursue their claims. In this respect, *Shore* may provide a boost to the initiation of class action suits.[47] Since liability may be partially or wholly established by a prior adjudication, the cost of litigation will be subsequently reduced and the prospect for success enhanced. Hesitancy to meet the high costs which now characterize the initiation of a class action are thereby counterbalanced.[48] Thus, *Shore* can be expected to result in more effective enforcement of the securities laws by promoting a greater number of private suits.[49] Moreover, the logic of the decision can be extended outside the securities area and may have far-reaching implications on antitrust, employment discrimination and consumer litigation.[50]

(defendant's request for advisory jury in SEC suit denied); SEC v. Wills, [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,321 (D.D.C. Feb. 11, 1978) (request for an advisory jury denied); SEC v. Petrofunds, Inc., 420 F. Supp. 958, 959-60 (S.D.N.Y. 1976) (requests for jury trial in SEC suit denied on ground that action was equitable in nature). Similarly, Congress expressly provided that, absent the consent of the SEC, actions instituted by the SEC pursuant to the securities laws are not to be consolidated with private actions, even where common questions of fact are involved. 15 U.S.C. § 78u(g) (1976); *see* S. REP. No. 94-75, 94th Cong., 1st Sess. 76-77, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 179, 254-55 wherein it was stated:

> Where the Commission sues for an injunction, it has already developed evidence of the existence of fraudulent actions, actual and threatened. If not hindered by the possibility of transfer and consolidation with claims of private litigants, it is then in a position to seek prompt preventive relief by way of an injunction. To delay the Commission action while administering the pretrial phase of the private actions is to risk leaving the defendants in the Commission's suit free to continue their potentially fraudulent conduct, and thus cause new losses to other investors.

[45] *See* Bialkin, *Securities Law,* Nat'l L.J., Feb. 26, 1979, at 22, col. 1; Brodsky, *Corporate and Securities Litigation,* N.Y.L.J., Feb. 7, 1979, at 2, col. 2.

[46] In SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied,* 394 U.S. 976 (1969), Judge Friendly, referring to violation of the antifraud provision of the securities laws, stated that an injunction is not an effective remedy because such violations generally are a once-in-a-lifetime occurrence. *Id.* at 869 (Friendly, J. concurring).

[47] For a general discussion of class actions brought under the securities laws, see 5 H. NEWBERG, NEWBERG ON CLASS ACTIONS, § 8800 (1977).

[48] *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175-76 (1974). *See also* 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 1010.2h (1977).

[49] *See* Comment, *The Effect of SEC Injunctions In Subsequent Private Damage Actions*—Rachal v. Hill, 71 COLUM. L. REV. 1329, 1336 (1971).

[50] *See* Note, Shore v. Parklane Hosiery Co. & *the Seventh Amendment and Collateral Estoppel,* 66 CAL. L. REV. 861, 871 (1978).

It should be noted, however, that *Shore's* impact may be limited in private actions brought pursuant to those sections of the securities laws which require a showing that the defendant acted with scienter. In *Shore,* the SEC suit and the private action involved identical issues. Once collateral estoppel effect was given to the determination that the proxy statements were materially false and misleading, only the question of damages remained to be litigated in the private action.[51] In other situations, however, such as actions brought under Rule 10b-5 of the Securities and Exchange Act of 1934, a private suitor must establish scienter in order to succeed while the SEC may only be required to prove negligence.[52] Thus, a jury trial on the question of liability would still be necessary.[53]

Shore mandates a flexible approach to future questions concerning the application of collateral estoppel. While the decision sanctions a liberal use of the doctrine by allowing it to be invoked offensively in the absence of mutuality, it also requires that all applications be tempered by considerations of fairness.

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[51] *See* 565 F.2d at 818.

[52] *See* Bialkin, *supra* note 45, at 22, col. 1. The Supreme Court, in Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), established as the standard in a private damage action brought under Rule 10b-5, but left open the question whether proof of scienter is required in an SEC enforcement action. The Second Circuit recently concluded that negligence is sufficient in an SEC action. *See* SEC v. Aaron, N.Y.L.J., Mar. 14, 1979, at 1, col. 2; SEC v. Coven, 581 F.2d 1020 (2d Cir. 1978), *cert. denied,* 47 U.S.L.W. 3584 (1979); SEC v. Universal Major Indus. Corp., 546 F.2d 1044 (2d Cir. 1976). *See generally,* Comment, *Scienter and SEC Injunctive Suits,* 90 HARV. L. REV. 1018 (1977).

[53] Brodsky, *supra* note 45, at 2, col. 2.